Lam Kong Co Ltd v Thong Guan Co Pte Ltd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPLICATION NO 08–41 OF 1998 (J)

CHONG SIEW FAI CJ (SABAH AND SARAWAK), MOHAMED DZAIDDIN FCJ AND HAIDAR JCA

19 MAY 2000

Civil Procedure *— Appeal — Leave to appeal — Appeal against decision of Court of Appeal that leave to appeal was necessary — Notice of appeal struck out due to failure to obtain leave to appeal — Appellant's rights not exhausted — Whether decision of Court of Appeal as to requirement for leave appealable — Whether decision of Court of Appeal was in respect of cause or matter decided by High Court on merits — Courts of Judicature Act 1964 s 96(a) — Interpretation Acts 1948 and 1967 s 17A*

The applicant filed a notice of appeal in the Court of Appeal against the decision of the High Court. The respondent filed a motion to dismiss the appeal on the ground that no leave was obtained from the Court of Appeal pursuant to s 68(1) of the Courts of Judicature Act 1964 ('the Act'). It was submitted that leave was necessary under s 68(1)(a) because the subject matter of the appeal was less than RM250,000. The Court of Appeal accepted the submission and struck out the notice of appeal. The applicant filed an application for leave to appeal to the Federal Court under s 96(a) of the Act from the decision of the Court of Appeal. The respondent raised a preliminary objection contending that the application was misconceived because it was founded on the decision of the Court of Appeal under s 68(1)(a) of the Act and not from its judgment or order in respect of a civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s 96(a) of the Act. The respondent relied on *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 ('*Auto Dunia*'). The issue was whether the decision of the Court of Appeal, upon a motion by the respondent, striking out the applicant's notice of appeal was appealable to the Federal Court under s 96(a) of the Act.

Held, dismissing the applicant's application for leave:

(1) (per **Mohamed Dzaiddin FCJ, Haidar JCA** concurring) The legal authority to decide whether leave is required or not under s 68(1)(a) of the Act is the Court of Appeal and therefore it follows that the decision of the Court of Appeal is final. To hold otherwise would lead to absurdity and defeat the 'filter' principle unless an appeal from it is expressly given. *Auto Dunia* decided that the order granting or refusing leave to appeal is final and not appealable. By analogy, the decision of the Court of Appeal whether leave is required or not should also similarly be final and not appealable. Such an interpretation would be in accord with the purpose of the legislature as provided by s 17A of the Interpretation Acts 1948 and 1967 (see pp 9E, 9I–10A).

(2) (per **Mohamed Dzaiddin FCJ**) The instant application was not against the judgment of the Court of Appeal in respect of a civil cause or matter decided by the High Court on the merits. On the true construction of s 96(a), the judgment or order of the Court of Appeal to appeal from must be in respect of a cause or matter decided by the High Court on the merits and not in respect of interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it. As a matter of policy, it is laudable to restrict the right of appeal from the Court of Appeal to the Federal Court with leave only to cases where the judgment or order of the Court of Appeal is in respect of any civil cause or matter decided by the High Court on the merits (see p 11C–F).

(3) (per **Mohamed Dzaiddin FCJ**) The step taken by the applicant was misconceived because though the Court of Appeal struck out the notice of appeal, the applicant's rights were not exhausted or shut out or for that matter in any way prejudiced. It was still open for the applicant to file a motion setting out the grounds in support thereof under r 16 of the Rules of the Court of Appeal 1994. By filing the present application, the applicant in effect was attempting to circumvent r 16 by coming straight for leave to the Federal Court. This was an abuse of the process of the court. The applicant must and should first exhaust all remedies available under the law (see p 12G–H).

(4) (per **Chong Siew Fai CJ (Sabah & Sarawak)** dissenting) *Auto Dunia* is distinguishable from the present case. In *Auto Dunia*, it was not disputed that leave to appeal to the Court of Appeal was necessary. Where it is beyond all question that leave to appeal is necessary, the decision of the Court of Appeal in exercising its discretion to grant or refuse leave is not appealable. But where the requirement of leave to appeal is in dispute, the Court of Appeal which hears the appeal strikes out or dismisses the appeal on the view that leave is necessary but not obtained, that decision of striking out or dismissal would be appealable, for the issue here is not whether to grant or refuse leave to appeal but rather whether the deciding court is right in holding that leave to appeal is necessary (see p 16C–E); *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 distinguished.

(5) (per **Chong Siew Fai CJ (Sabah & Sarawak)** dissenting) The words 'in respect of' in s 96(a) of the Courts of Judicature Act 1964 means that there must be some connection or relation between the judgment or order of the Court of Appeal and the civil cause or matter decided by the High Court in the exercise of its original jurisdiction. In the present case, the High Court's decision granting the relief sought in the action arising out of which the present appeal was brought was in respect of a civil cause decided by the High Court in the exercise of its original jurisdiction. There clearly was an indisputable connection or

relation between the order of the Court of Appeal and the decision of the High Court. It follows that s 96(a) of the Courts of Judicature Act 1964 was applicable in that the decision of the Court of Appeal made on 28 May 1998 striking out the applicant's notice of appeal was appealable (see pp 16H, 17A–B, 18B).

(6) (per **Chong Siew Fai CJ (Sabah & Sarawak)** dissenting) As a matter of law, estoppel arises when a person by his conduct or words makes a clear representation of fact either with knowledge of its falsehood or with the intention that it should be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice. In the present case, the Court of Appeal had expressed its view that leave to appeal was necessary. It was then that the applicant in deference to the view of the Court of Appeal and perhaps to save time and expenses of having to make a formal application that it applied orally for leave. In any event it was not granted by the Court of Appeal. The question of acting upon the representation to the prejudice of a party does not arise (see pp 18H, 19C–D).

[Bahasa Malaysia summary

Pemohon telah memfailkan satu notis rayuan dalam Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi. Responden telah memfailkan satu usul untuk menolak rayuan tersebut atas alasan bahawa tiada rayuan telah diperolehi daripada Mahkamah Rayuan selaras dengan s 68(1) Akta Mahkamah Kehakiman 1964 ('Akta tersebut'). Adalah dihujahkan bahawa kebenaran adalah perlu di bawah s 68(1)(a) kerana halperkara rayuan tersebut adalah kurang daripada RM250,000. Mahkamah Rayuan telah menerima hujahan tersebut dan membatalkan notis rayuan. Pemohon telah memfailkan satu permohonan untuk merayu kepada Mahkamah Persekutuan di bawah s 96(a) Akta tersebut daripada keputusan Mahkamah Rayuan. Responden telah membangkitkan bantahan awal yang menegaskan bahawa permohonan tersebut telah disalahtafsirkan kerana ia berasaskan keputusan Mahkamah Rayuan di bawah s 68(1)(a) Akta tersebut dan tidak daripada penghakiman atau perintahnya berhubung dengan kausa atau perkara sivil yang telah diputuskan oleh Mahkamah Tinggi dalam melaksanakan bidang kuasa asalnya di dalam lingkungan maksud s 96(a) Akta tersebut. Responden telah bergantung pada *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 ('*Auto Dunia*'). Isunya adalah sama ada keputusan Mahkamah Rayuan, di atas satu usul oleh responden, yang membatalkan notis rayuan pemohon boleh dirayui di Mahkamah Persekutuan di bawah s 96(a) Akta tersebut.

Diputuskan, menolak permohonan pemohon untuk kebenaran:

(1) (oleh **Mohamed Dzaiddin HMP, Haidar HMR** bersetuju) Authoriti undang-undang untuk memutuskan sama ada

kebenaran diperlukan atau tidak di bawah s 68(1)(a) Akta tersebut adalah Mahkamah Rayuan dan dengan itu didapati bahawa keputusan Mahkamah Rayuan adalah muktamad. Untuk memutuskan sebaliknya pula akan membawa kepada kemustahilan dan mengalahkan prinsip 'filter' melainkan sesuatu rayuan daripadanya diberikan secara nyata. *Auto Dunia* memutuskan bahawa perintah yang memberikan atau menolak kebenaran untuk merayu adalah muktamad dan tidak boleh dirayui. Menurut analogi, keputusan Mahkamah Rayuan sama ada kebenaran diperlukan atau pun tidak haruslah begitu juga menjadi muktamad dan tidak boleh dirayui. Pentafsiran yang sedemikian akan menjadi sejajar dengan tujuan perundangan seperti mana yang diperuntukan oleh s 17A Akta-akta Tafsiran 1948 dan 1967 (lihat ms 9E, 9I–10A).

(2) (oleh **Mohamed Dzaiddin HMP**) Permohonan semasa bukannya terhadap penghakiman Mahkamah Rayuan berhubung dengan perkara atau kausa sivil yang diputuskan oleh Mahkamah Tinggi berdasarkan merit. Berdasarkan pembentukan sebenar s 96(a), penghakiman atau perintah Mahkamah Rayuan untuk dirayui semestinya atas merit dan bukan berhubung dengan penghakiman interlokutori atau perintah yang telah diputuskan oleh Mahkamah Rayuan setelah mendengar satu permohonan yang dibuat kepadanya dalam sesuatu rayuan yang sedang menanti penyelesaian di hadapannya. Sebagai satu polisi, adalah sangat baik untuk menyekat hak merayu daripada Mahkamah Rayuan kepada Mahkamah Persekutuan dengan kebenaran hanya kepada kes-kes di mana penghakiman atau perintah Mahkamah Rayuan adalah berhubung mana-mana kausa atau perkara sivil yang telah diputuskan oleh Mahkamah Tinggi atas merit (lihat ms 11C–F).

(3) (oleh **Mohamed Dzaiddin HMP**) Langkah yang telah diambil oleh pemohon telah disalah-tafsirkan kerana meskipun Mahkamah Rayuan telah membatalkan notis rayuan, hak pemohon tidak dihapuskan atau diketepikan atau dijejaskan. Adalah masih terbuka bagi pemohon memfailkan satu usul yang membentangkan alasan-alasan bagi menyokongnya di bawah k 16 Kaedah-Kaedah Mahkamah Rayuan 1994. Dengan memfailkan permohonan semasa, pemohon pada hakikatnya cuba untuk memintas k 16 dengan terus memohon kebenaran kepada Mahkamah Rayuan. Ini adalah satu penyalahgunaan proses mahkamah. Pemohon semestinya dan haruslah pertamanya menghabiskan semua remedi yang ada di bawah undang-undang (lihat ms 12G–H).

(4) (oleh **Chong Siew Fai HB (Sabah & Sarawak)** menentang) *Auto Dunia* adalah berbeza daripada kes ini. Di dalam kes *Auto Dunia*, tidak dipertikaikan bahawa kebenaran untuk membuat rayuan ke Mahkamah Rayuan adalah perlu. Di mana ia adalah jelas bahawa kebenaran untuk membuat rayuan adalah perlu,

keputusan Mahkamah Rayuan di dalam menggunakan budi bicaranya untuk memberi atau menolak kebenaran tidak boleh dirayui. Namun begitu di mana keperluan memohon kebenaran untuk membuat rayuan dipertikaikan, Mahkamah Rayuan yang mendengar rayuan tersebut mengetepikan atau menolak rayuan tersebut atas pandangan bahawa kebenaran tersebut adalah perlu tetapi tidak diperolehi, maka keputusan untuk satu penepian atau penolakan boleh dirayukan, sebab persoalan di sini bukan mengenai pemberian atau keengganan memberikan kebenaran untuk membuat rayuan tetapi lebih kepada sama ada mahkamah yang membuat keputusan tersebut adalah betul di dalam memutuskan bahawa kebenaran untuk membuat rayuan adalah perlu (lihat ms 16C–E); *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 dibeza.

(5) (oleh **Chong Siew Fai HB (Sabah & Sarawak)** menentang) Perkataan-perkataan 'berkenaan dengan' (in repect of) dalam s 96(a) Akta Mahkamah Kehakiman 1964 bermaksud bahawa terdapat perkaitan atau hubungan antara penghakiman dan perintah Mahkamah Rayuan dan kausa atau perkara sivil yang diputuskan oleh Mahkamah Tinggi di dalam menggunakan bidang kuasa yang asal. Di dalam kes ini, keputusan Mahkamah Tinggi membenarkan relif yang dipohon di dalam tindakan yang timbul daripada rayuan yang dihadapkan ini adalah berhubung dengan satu kes sivil yang telah diputuskan oleh Mahkamah Tinggi yang menggunakan bidang kuasa asal. Jelas terdapat perkaitan atau hubungan antara perintah Mahkamah Rayuan dan keputusan Mahkamah Tinggi. Berikutan itu, s 96(a) Akta Mahkamah Kehakiman 1964 adalah terpakai dan maka keputusan Mahkamah Rayuan yang dibuat pada 28 Mei 1998 yang mengetepikan notis rayuan pemohon boleh dirayui (lihat ms 16H, 17A–B, 18B).

(6) (oleh **Chong Siew Fai HB (Sabah & Sarawak)** menentang) Dari segi undang-undang, estopel timbul apabila seseorang melalui perbuatan atau perkataan membuat satu representasi fakta yang nyata sama ada dengan pengetahuan mengenai kepalsuannya atau dengan niat ia dilaksanakan, dan seorang yang lain telah bertindak atas representasi tersebut dan oleh itu memprejudiskan kedudukan beliau. Di dalam kes ini, Mahkamah Rayuan telah menyatakan pandangannya bahawa kebenaran untuk membuat rayuan adalah perlu. Hanya setelah itu pemohon sebagai menghormati pandangan Mahkamah Rayuan dan mungkin untuk menjimatkan masa dan perbelanjaan untuk membuat satu permohonan rasmi telah memohon kebenaran secara lisan. Di dalam apa keadaanpun, ia tidak diberikan oleh Mahkamah Rayuan. Persoalan bertindak atas representasi yang prejudis terhadap satu pihak tidak timbul (lihat ms 18H, 19C–D).]

Notes

For cases on leave to appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 667–709.

Cases referred to

Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549 (distd)
Dutton v Sneyd Bycars Co Ltd [1920] 1 KB 414 (refd)
Farquharson v Morgan [1894] 1 QB 552 (refd)
Foster v Usherwood 47 LJQB 30 (refd)
Kemper Insurance v Minister of Finance & Ors [1998] 3 WLR 630 (refd)
Lane v Esdaile [1891] AC 210 (refd)
O'Reilly & Ors v Mackman & Ors [1983] 2 AC 237 (refd)
Poh, Re [1983] 1 All ER 287 (refd)
Rickards v Rickards [1989] 3 All ER 193 (refd)
Stevenson & Ors, Ex parte [1892] 1 QB 609 (refd)
Tolaram Relumal & Anor v State of Bombay AIR 1954 SC 496 (refd)
Trustees, Executors and Agency Co Ltd v Reilly [1941] VLR 110 (refd)

Legislation referred to

Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947) s 18(1) [India]
Courts of Judicature Act 1964 ss 44, 45, 46, 47, 48, 49, 67, 68(1)(a), 96(a), 97
Courts of Judicature (Amendment) Act 1994
Interpretation Acts 1948 and 1967 s 17A
Rules of the Court of Appeal 1994 r 16
Rules of the Federal Court 1995 r 107(2)
Workman's Compensation Act 1906 [Eng]

Appeal from: Civil Appeal No J–02–29 of 1998 (Court of Appeal, Kuala Lumpur)

CV Das (*R Abraham* and *Sunita S Sothi* with him) (*Brockett & Cho*) for the applicant.

M Patmanathan (*Gan Techiong* with him) (*Gan & Lim*) for the respondent.

Chong Siew Fai CJ (Sabah & Sarawak):

Intoduction

By a motion dated 24 June 1998, the applicant applied for leave to appeal to the Federal Court against the decision of the Court of Appeal made on 28 May 1998 striking out the appeal of the applicant to the Court of Appeal against the decision of the High Court dated 29 December 1997 on the ground that leave to appeal which, according to the Court of Appeal, was necessary but was not obtained.

A The matter was heard before us on 29 March 2000 and 13 April 2000, and the motion was dismissed with costs on a preliminary objection raised by the respondent. It was a majority decision. I had the misfortune of dissenting. We indicated that the grounds of our decisions would be given in due course. I now give my reasons.

B *The preliminary objections*

At the commencement of the hearing of the motion, counsel for the respondent raised three preliminary objections and submitted that by reason thereof the motion ought to be dismissed. The three preliminary objections are:

C

(1) that the Federal Court had no jurisdiction to hear the motion. (For the basis of this contention, see the latter part of this judgment under the heading 'Preliminary objection (1)'.);

(2) that by reason of counsel for the applicant orally applying on its behalf before the Court of Appeal for leave to appeal, the applicant was D estopped from contending before us that leave to appeal was not necessary; and

(3) that there had been a failure to comply with r 107(2) of the Rules of the Federal Court 1995 in that the application did not state whether the intended appeal was against the whole or only a part of the E judgment or order, and, if only a part, which part of the judgment or order, and the grounds therefore. This ground, however, was only faintly pursued. In any event, I was of the view that the non-compliance would not vitiate the motion. Effectively, this ground (3) would be thus disposed of.

F *Background facts*

Before coming to preliminary objections (1) and (2), it would be useful to state briefly the relevant facts and circumstances leading to the motion before us. Pursuant to a sales and purchase agreement dated 28 July 1967 and entered between the parties herein, the applicant agreed to sell to the G respondent 26 pieces of land for a total price of S$52,000 which had been paid in full. Disputes arose resulting in the respondent bringing this suit claiming, inter alia, for the transfer to itself the 26 parcels of land and certain consequential orders. On 14 January 1980, the respondent obtained judgment in default of appearance. Pursuant to the default H judgment, the senior assistant registrar ('the SAR') of the High Court executed the transfers of the 26 pieces of land in favour of the respondent. Since the land titles were not available, the land collector issued fresh land titles. But, for some unknown reason, only 25 titles were issued instead of 26.

On 10 May 1985, the Federal Court, on appeal by the applicant, set I aside the default judgment and remitted the case back to the High Court for trial. However, the transfer of the 25 pieces of land to the respondent which had already been effected remained intact.

Parties then amended their pleadings upon which trial before the High Court proceeded and resulted in the learned trial judge granting the respondent, inter alia, the following claims on 29 December 1997:

(a) a declaration that the 25 fresh land titles issued to the respondent were valid;

(b) that the registrar of titles was to indorse the respondent as the registered proprietor on the 25 titles;

(c) that the applicant was to deliver to the respondent the land title relating to the 26th piece of land;

(d) that the applicant was to transfer the 26th piece of land to the respondent;

(e) assessment of damages for the delay on the part of the respondent;

(f) costs.

By a notice of appeal dated 7 January 1998, the applicant appealed to the Court of Appeal. On the respondent's motion dated 16 April 1998, the Court Appeal on 28 May 1998 struck out the applicant's notice of appeal dated 7 January 1998.

Judgment of the Court of Appeal

In its judgment, the Court of Appeal referred to s 68(1) of the Courts of Judicature Act 1964 ('the Act'). On the assumed basis of its being 'undisputed' (which the applicant in fact disputed) that the subject-matter being the sale and purchase agreement for the sale of the 26 pieces of land with the contract price below RM250,000, the Court of Appeal was of the view that leave to appeal was necessary and that since such leave was not first obtained, the appeal was incompetent and the notice of appeal was struck out. The Court of Appeal did not consider it making any difference to the fate of the notice of appeal even if the subject-matter of the claim were the 26 issue documents of title since they related to the 26 pieces of land that were referred to in the sales and purchase agreement which stipulated the total price of S$52,000 ie below RM250,000.

Against the decision of the Court of Appeal on 28 May 1998, the applicant applied to this court for leave to appeal.

Preliminary objection (1)

For the respondent, it was contended that the Federal Court had no jurisdiction to entertain this motion of the applicant dated 24 June 1998 for leave to appeal against the decision of the Court of Appeal made on 28 May 1998 striking out the applicant's appeal. The basis for this argument was that the Court of Appeal had the sole discretion to determine:

(i) whether or not leave to appeal to itself was required; and

(ii) if leave to appeal was required, whether or not to grant leave to appeal to itself;

A and that the decisions of the Court of Appeal on matters (i) and (ii) above were final and non-appealable. *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 (FC) was cited in support.

For the applicant, counsel, while conceding that a decision of the Court of Appeal granting or refusing leave to appeal to itself was non-appealable, B contended that the situation in the present case was different. Here, the applicant argued, the Court of Appeal struck out the appeal on the basis (which the applicant disputed) that leave to appeal to the Court of Appeal was required. *Rickards v Rickards* [1989] 3 All ER 193 (CA) was cited to illustrate that despite *Lane v Esdaile* [1891] AC 210 (HL) from which the extended principle could be derived that where the law provided that an C appeal was to lie by leave of a particular court or courts, the grant or refusal of leave was an non-appealable decision, the Court of Appeal had jurisdiction (subject to the requirements of leave to appeal) to hear an appeal from a county court judge's refusal to extend time for appealing to the judge from an order of the registrar, departing from *Podbery v Peak* [1981] 1 All ER 699 (CA).

D *Auto Dunia*, decided that on an application to the Court of Appeal for leave to appeal to the Court of Appeal against a decision of the High Court, the decision of the Court of Appeal refusing leave (or, for that matter, granting leave) to appeal to itself was not a judgment or order within s 96(a) of the Act and therefore not appealable to the Federal Court. The Federal E Court accordingly had no jurisdiction to entertain an application for leave against such a grant or refusal by the Court of Appeal.

In my view, *Auto Dunia*, is distinguishable from our present case. In *Auto Dunia*, it was not disputed that leave to appeal to the Court of Appeal was necessary. Hence, what the Court of Appeal had to decide was whether to grant or to refuse leave. In our present case, whether leave to appeal to F the Court of Appeal is necessary is in dispute. The applicant took the stand that no leave to appeal was needed and hence did not apply for leave. On the other hand, the respondent maintained that leave to appeal was necessary and must be first applied for and obtained. In the result, the Court of Appeal agreed with the respondent and ordered the applicant's G notice of appeal to be struck out. In ordering the striking out, upon the mind of the Court of Appeal was that leave to appeal was necessary and that since it was not first obtained, the appeal was incompetent and must be struck out. It was upon the above consideration that the appeal was struck out. If (which I am not deciding here) the Court of Appeal happened to be wrong in its view that leave to appeal was required, then the striking out of the H notice of appeal would have been unjustified. The state of affairs are significantly different from the *Auto Dunia* situation where it was common ground that leave to appeal was an essential element and the issue for the Court of Appeal was whether, on the facts and circumstances of the case, to grant or not to grant. The distinction may be fine but nevertheless important and subtle. Where it is beyond all question that leave to appeal is I necessary, the decision of the Court of Appeal in exercising its discretion to grant or to refuse leave is not appealable. But where the requirement of leave to appeal is in dispute, the Court of Appeal which hears the appeal

strikes out or dismisses the appeal on the view that it takes that leave to appeal is necessary but not obtained. That decision of striking out or dismissal would, in any view, be appealable, for the issue here is not whether to grant or refuse leave to appeal (which would be non-appealable), but rather whether the deciding court is right in holding that leave to appeal is necessary.

Section 96(a) of the Courts of Judicature Act 1964

So far as is relevant for our purpose, s 96(a) of the Courts of Judicature Act 1964 provides:

> Subject to any ... rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction ... .

Relying on the above quoted provisions of s 96(a) of the Act, counsel for the respondent submitted to the effect that the decision of the Court of Appeal striking out the applicant's notice of appeal for want of leave to appeal to the Federal Court was not a judgment or order in respect of a civil cause or matter decided by the High Court in the exercise of its original jurisdiction, and therefore not appealable.

I am unable to agree with the contention. There can, of course, be no dispute that the decision of the Court of Appeal on 28 May 1998 striking out the applicant's notice of appeal for want of leave to appeal is a judgment or order of the Court of Appeal. Neither can there be any dispute that the decision of the learned trial judge on 29 December 1997 granting the relief sought by the respondent constituted a 'civil cause or matter decided by the High Court in the exercise of its original jurisdiction'. The question is: Can the 'striking out' decision of the Court of Appeal on 28 May 1998 be said to be 'in respect of' a 'civil cause or matter decided by the High Court in the exercise of its original jurisdiction?'. This, in my view, hinges on the construction of the words 'in respect of'7 in s 96(a) of the Act.

For the applicant, Dr Das relied on various cases for the interpretation of the words 'in respect of'. I would refer to only one of them. In *Tolaram Relumal & Anor v State of Bombay* AIR 1954 SC 496, s 18(1) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947) called for consideration. The said s 18(1) provided:

> If any landlord either by himself or through any person ... receives any fine, premium ... in respect of the grant, renewal or continual of a lease of any premises ... such landlord or person shall be punished ... .

One of the issues was that even assuming the accused had accepted a sum of Rs2400, could the receipt of that sum be held, in law, to be a premium in respect of the grant of a lease? Delivering the judgment of the court, Mahajan CJ made the following observation on the expression 'in respect of' (at p 498):

> '*In respect of*' means in its plain meaning 'connected with or attributable to ', and therefore it is not necessary that there must be a simultaneous receipt by the landlord with the grant of the lease. So long as 'some connection' is established between the grant of the lease and the receipt of the premium by the landlord, the provisions of the section would be satisfied.

In the Australian case of *Trustees, Executors and Agency Co Ltd v Reilly* [1941] VLR 110 (facts therein are not relevant for our purpose) Mann CJ explained the words '*in respect of*' thus (at p 111):

> The words 'in respect' are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer.

To my mind the explanations of Mann CJ and Mahajan CJ in the above two cases aptly describe the ordinary meaning of the words 'in respect of'. Guided by the explanations, the words '*in respect of*' in s 96(a) of the Act means, in my view, that there must be some connection or relation between the judgment or order of the Court of Appeal and the civil cause or matter decided by the High Court in the exercise of its original jurisdiction. Applying the above construction of the three words to the case presently under appeal, the question is: Is there a connection or relation between the order of the Court of Appeal striking out the applicant's notice of appeal on the basis (which the applicant disputed) that leave to appeal was necessary but not obtained and the High Court's decision granting the relief sought in the action arising out of which the present appeal before us was brought. The High Court's decision is in respect of a '*civil cause decided by the High Court in the exercise of its original jurisdiction.*' Hence, in my view, there clearly is an undisputable connection or relation between the said order of the Court of Appeal and the decision of the trial judge in the High Court.

It follows that s 96(a) of the Act is applicable in that the decision of the Court of Appeal made on 28 May 1998 in striking out the applicant's notice of appeal is appealable subject, of course, to leave of the Federal Court being granted.

In so deciding, I, of course, have not lost sight of *Auto Dunia*, which I have earlier sought to distinguish.

Estoppel

For the respondent, it was further argued that the applicant, having orally applied for leave to appeal in the course of the hearing before the Court of Appeal, was estopped from contending that leave to appeal was not necessary. I am unable to accept this argument. The point in issue relates to the jurisdiction of the Court of Appeal, ie whether the Court of Appeal had jurisdiction to strike out the notice of appeal when the disputes seriously in contest were whether s 68(1)(a) of the Act was applicable so that leave of the Court of Appeal was necessary for the appeal, and whether the principle laid down in *Auto Dunia* applied. In law, where an objection to the jurisdiction of a lower court appears on the face of the proceedings, a party who consented to the exercise of the jurisdiction is not thereby

estopped from subsequently raising the objection: *Farquharson v Morgan* [1894] 1 QB 552 (CA). This is because the jurisdiction of a court of limited jurisdiction cannot be enlarged by any form of estoppel.

In *Dutton v Sneyd Bycars Co Ltd* [1920] 1 KB 414 (CA), the applicant, a workman, contracted certain disease whilst in the respondent's employment. Prior to suing for compensation on account of the disease suffered, he had received some payments from the respondent company and had signed certain form. It was admitted that the disease the applicant suffered was not a disease mentioned in the relevant Schedule to the Workman's Compensation Act 1906, or in the orders extending the operation of that Schedule. For the applicant, it was contended that the respondent was estopped, by its conduct, from denying that the case came within the said Act. The county court judge held that the estoppel was established and awarded the applicant compensation. The respondent appealed to the Court of Appeal. In allowing the appeal, Warrington LJ observed (at pp 419–420):

> The operation of the Act is confined to a certain class of cases, and it seems to me that the parties cannot by any form of estoppel or by agreement so enlarge the operation of the Act as to bring within it other cases, or to extend the limited statutory jurisdiction to those cases.

In *Foster v Usherwood* 47 LJQB 30 the registrar, upon an application by the defendant to have the case tried in a county court under certain provisions of the law (the provisions are of no relevance for our purpose) and with the plaintiff consenting to the application, made an order for the action to be tried in the county court. Subsequently, however, he came to the conclusion that the relevant law gave him no jurisdiction to make the order, and he rescinded it. Eventually, the defendant appealed to the Court of Appeal where it was argued on his behalf that the parties had waived the objection. In his judgment, Bramwell LJ said:

> I do not understand what is meant by an agreement that the registrar shall have jurisdiction. Where he has not, the parties cannot give it to him .... I am of opinion that this objection of want of jurisdiction is one which cannot be waived, and the parties cannot give jurisdiction by dispensing with something which is necessary to create it.

Estoppel in pais, as a matter of law, arises when a person by his conduct or words makes a clear representation of fact either with knowledge of its falsehood or with the intention that it should be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice. In our instant case, the Court of Appeal had expressed its view that leave to appeal was necessary. It was then that the applicant in deference to the view of the Court of Appeal and, perhaps, to save time and expenses of having to make a formal application that it applied orally for leave. In any event, it was not granted by the Court of Appeal. The question of acting upon the representation to the prejudice of a party does not arise.

For the above reasons, I was of the view that the preliminary objection of the respondent failed. I would proceed to hear the applicant's motion for leave to appeal.

Mohamed Dzaiddin FCJ: This was an application for leave to appeal to this court under s 96(a) of the Courts of Judicature Act 1964 ('the Act') from the decision of the Court of Appeal given on 28 May 1998 and for ancillary orders.

At the outset of the proceedings, En Pathmanathan, counsel for the respondent, raised a preliminary objection contending that the application is misconceived because it is founded on the decision of the Court of Appeal under s 68(1)(a) of the Act and not from its judgment or order in respect of a civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s 96(a) of the Act. Hence, the motion should be struck out.

After hearing counsel, by a majority decision (Chong Siew Fai CJ (Sabah & Sarawak) dissented), we upheld the objection and struck out the motion with costs to the respondent. Our reasons are these.

Background

On 7 January 1998, the applicant filed a notice of appeal in the Court of Appeal against the decision of the High Court Johor Bahru in Guaman Sivil No 22–254–1979. On 18 February 1998, the applicant duly filed the appeal record.

On 16 April 1998, the respondent filed a motion to dismiss the appeal on the ground that no leave was obtained from the Court of Appeal pursuant to s 68(1) of the Act. Subsequently, on 7 and 8 May 1998 respectively, the applicant filed two other applications for leave to file a supplementary appeal record and for stay of execution of the High Court order.

On 28 May 1998, the Court of Appeal heard the three motions. With respect to the respondent's application to strike out the applicant's notice of appeal, it was the submission of counsel that leave was necessary under s 68(1)(a) because the subject-matter of the appeal was less than RM250,000, based on the value stated in the sale and purchase agreement purportedly entered into between the applicant as vendor and respondent as purchaser. The relevant paragraph of s 68(1) reads as follows:

> Non-appealable matters
>
> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal; ... .

The Court of Appeal accepted the above submission. In its seven-page judgment, the court held as follows:

> It is undisputed that the value of the subject-matter in this case which was the value of the contract price was below RM250,000 and we are of the view that it falls squarely within the requirement of s 68(1)(a) of the Act in that leave must first be obtained before an appeal can be filed.

> Learned counsel for the applicant/appellant also urged us that the damages prayed for in prayer (vi) in the statement of claim should be added to the value of the subject-matter so that the total value would be unknown; thus it would pass the test laid down in section 68(1)(a) of the Act and therefore leave would not be required. We however were unable to accept such a proposition for the reason that s 68(1)(a) of the Act clearly specifies that the 'value' that is required to be quantified must be the 'value' of the subject-matter of the claim'. The damages as prayed in Prayer (vi) are only-consequential. They are not the 'subject-matter of the claim'.

In view of its decision to strike out the notice of appeal, the other two motions were accordingly dismissed by the Court of Appeal with no order as to costs.

Arguments on the preliminary objection

The crucial question here is whether the decision of the Court of Appeal, upon a motion by the respondent, striking out the applicant's notice of appeal is appealable to the Federal Court under s 96(a) of the Act.

The material part of s 96(a) states:

> Subject to ... any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court ... .
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction ...

The thrust of En Pathmanathan's submission is that the present application originated from the Court of Appeal against its decision upon a motion by the respondent to strike out the applicant's notice of appeal to the Court of Appeal on the ground that the notice was filed without leave contrary to s 68(1)(a) of the Act. The decision is not in respect of a civil cause or matter decided by the High Court. But, it is a decision based on a motion to strike out the notice of appeal filed in the Court of Appeal. Therefore, a decision of the Court of Appeal that the applicant's notice of appeal required leave under s 68(1)(a) is not a judgment or order within the meaning of s 96(a) of the Act.

Counsel relied solely on *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 which held that refusal of leave to appeal by the Court of Appeal was not a judgment or order within the meaning of s 96(a) of the Act.

Dr Das, for the applicant, in his reply (see his written outline of submission) submitted that it would seem that the Court of Appeal could not decide anything on a cause or matter unless there was an appeal pending or an intended appeal before it. It did not have any original jurisdiction like the High Court, eg to grant an injunction, or to issue certiorari, declaration or mandamus or to make declarations of rights. However, if there was a pending appeal, by s 44, the Court of Appeal could make adjunctive orders in relation to the appeal to facilitate the appeal, eg a stay, to order security,

A or to enlarge time, or to allow further evidence etc. In addition, it could also deal with other matters relating to the appeal, eg that the appeal is incompetent because leave was not obtained or that the notice of appeal was filed out of time or that the appeal record was filed out of time etc. These are not orders made by the Court of Appeal from a decision of the High Court, but in a sense, they are made for the first time in the Court of Appeal
B Relying on his submission that the phrases '*any judgment or order*' and '*in respect of*' are words of the wide amplitude, counsel contended that they are nevertheless orders made in respect of an appeal from a decision made by the High Court for it is the appeal from the High Court that vests the Court of Appeal with jurisdiction to make orders. Thus, on a plain reading of
C s 96(a), the phrase '*any judgment or order of the Court of Appeal*' would give the Federal Court jurisdiction to receive an appeal from a decision of the Court of Appeal.

Dr Das's second point is on the decision of the Federal Court in *Auto Dunia*, where it was held, per Edgar Joseph Jr FCJ, that the exercise of a discretion to grant or refuse leave to appeal is not judgment or order within
D the meaning of s 96(a) of the Act. According to counsel, the case was decided purely on policy considerations addressed by the House of Lords in *Lane v Esdaile* [1891] AC 210 with respect to leave requirements, namely, that the objective of limiting appeals by requiring leave would be defeated if there could be an appeal against the grant or refusal of leave itself. Counsel
E referred us to the recent decisions of the English Court of Appeal in *Rickards v Rickards* [1989] 3 All ER 193 which refused to apply *Lane v Esdaile* and *Kemper Insurance v Minister of Finance & Ors* [1998] 3 WLR 630, a Privy Council decision distinguishing *Lane v Esdaile*. He urged us to follow *Rickards v Rickards* and confine *Auto Dunia* only to an order granting or refusing leave and not to cover a decision by the Court of
F Appeal striking out a notice of appeal under s 68(1)(a) of the Act for want of leave.

It is trite that the Court of Appeal today no longer has any original jurisdiction after the repeal of ss 45–49 of the Act by the Courts of Judicature (Amendment) Act 1994 (Act A886). What remains is its criminal and civil appellate jurisdiction. Section 67 gives the Court of
G Appeal jurisdiction to hear and determine civil appeals from judgments or orders of the High Court. Section 68 deals with non-appealable matters to the Court of Appeal. We agree with counsel that under s 44 of the Act, a judge of the Court of Appeal can give incidental directions and make interim orders in any proceeding pending before it which do not involve the
H decision of the proceeding. Quite clearly, this jurisdiction is conferred on the Court of Appeal to prevent any prejudice to the claims of the respective parties pending the hearing of the proceeding. In our view, the key words in s 44 are '*not involving the decision of the proceeding*'.

We also agree that the Court of Appeal can deal with other matters relating to or in pending appeal, eg whether the appeal is incompetent
I because leave was not obtained or whether in a given situation leave was necessary, or that the notice of appeal was filed out of time or the appeal record was not filed in time, etc. The parties can apply to the court, which

unless otherwise provided are made by motion and heard in open court. See Part III Rules of the Court of Appeal 1994. It is clear to us that the decision of the Court of Appeal on those matters are decisions or orders made for the first time in the Court of Appeal. Dr Das contended that although they are *in a sense* (emphasis added) made for the first time in the Court of Appeal, nevertheless they are orders or decisions made *in respect* of an appeal from the decisions made by the High Court under s 96(a) of the Act.

If the submission of Dr Das that whether leave is required or not are orders or decisions made *in respect* of an appeal from the judgment or order made by the High Court under s 96(a) of the Act is correct, it follows that the granting or refusal of leave are also orders or decisions made *in respect* of judgment or order made by the High Court, then *Auto Dunia* was wrongly decided. With respect, we disagree.

It would seem clear to us that the legal authority to decide whether leave is required or not under s 68(1)(a) of the Act is the Court of Appeal and therefore it follows that the decision of the Court of Appeal is final. To hold otherwise would lead to absurdity and defeat the 'filter' principle unless an appeal from it is expressly given.

In our view, there are two parts to s 68(1)(a) of the Act. Firstly, whether the subject matter requires leave and secondly, if leave is required, whether it should be granted or refused. *Auto Dunia* decided that the order granting or refusing leave to appeal is final and not appealable. By analogy, the decision of the Court of Appeal whether leave is required or not should also similarly be final and not appealable.

In our view, such an interpretation would be in accord with the purpose or object of the legislature as provided by s 17A of the Interpretation Acts 1948 and 1967 (Act 388) which reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The purpose or object is the 'filter' principle as decided by *Auto Dunia* in which the same principle should be applied in the matter before us.

So a question that arises is whether the instant application for leave to appeal is from the judgment or order of the Court of Appeal in respect of a civil cause or matter decided by the High Court. Clearly, the application is founded on the judgment of the Court of Appeal in a pending appeal made on an application by the respondent to strike out the applicant's notice of appeal on the ground that it was filed without leave of the Court of Appeal as required by s 68(1)(a) of the Act. In short, the instant application is not against the judgment of the Court of Appeal in respect of a civil cause or matter decided by the High Court on the merits.

It is to be noted that Parliament has thought fit to impose conditions in respect of right of appeal from the Court of Appeal to the Federal Court under s 96(a) of the Act. The conditions are that leave of the Federal Court must be obtained and the matters that are appealable are from any

judgment or order of the Court of Appeal in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction. On the true construction of s 96(a), we form the view that the judgment or order of the Court of Appeal to appeal from must be in respect of a cause or matter decided by the High Court on the merits and not in respect of interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it. Unless there is an express provision that an appeal shall lie from the Court of Appeal to this Court from its interlocutory judgment or order in respect of a matter pending appeal before it, by necessary intendment of s 96(a) the interlocutory judgment or order of the Court of Appeal is not appealable and does not come within the meaning of s 96(a) of the Act.

We were urged by En Pathma that we should follow *Auto Dunia* which adopted the policy considerations in *Lane v Esdaile.* Dr Das however cautioned us that in the UK, *Lane v Esdaile* principle which applied to cases where leave provisions are involved has not been extended to a decision involving refusing to extend time to appeal (*Rickards v Rickards*) and to judicial review leave cases (*Kemper Insurance*).

In *Auto Dunia* the defendant made an application to the Federal Court for leave to appeal against the decision of the Court of Appeal refusing to grant him leave to appeal under s 68(1)(a) of the Act from the decision of the High Court Ipoh. The question which arose upon the preliminary objection was whether the refusal of leave by the Court of Appeal was 'a judgment or order' within the meaning of s 96(a) of the Act. Having regard to the circumstances of the case and the language of the relevant statutory provisions viz ss 67, 68(1)(a), 96(a) and 97 of the Act, the Federal Court held it was not. Edgar Joseph Jr FCJ, in his judgment relied on the judgment of Lord Halsbury LC in *Lane v Esdaile.* His Lordship also followed *Ex parte Stevenson & Ors* [1892] 1 QB 609 and in *Re Poh* [1983] 1 All ER 287 (HL) which applied the ratio in *Lane v Esdaile.* In short, *Auto Dunia* applied the principles enunciated therein. Thus, the true ratio of the House of Lords' decision is that where it is provided that an appeal shall lie by leave of a particular court or courts, neither the grant or the refusal of such leave is itself appealable, otherwise the introduction of the 'filter' requiring leave would be pointless (per Lord Donaldson MR in *Rickards v Rickards* at pp 197, 201). In the result, there is no reason why this court should disagree with the reasons and conclusion stated in *Auto Dunia.*

We agree with Dr Das that *Lane v Esdaile* principle has not been applied to applications for an extension of time for appealing (*Rickards v Rickards*) and to applications for leave to apply for judicial review (*Kemper Reinsurance*). In fact, it has been applied in numerous cases as binding authority for the more limited proposition regarding power of a legal authority to grant or refuse leave to appeal. Nevertheless, it was decided on the basis of policy consideration with respect to leave, for if the grant or refusal of leave is itself appealable, 'the introduction of the 'filter' requiring leave would be pointless' (*Rickards v Rickards*).

In *Kemper Reinsurance*, the case of *O'Reilly & Ors v Mackman & Ors* [1983] 2 AC 237 was referred to, in which Lord Diplock, at p 280 stated that the purpose of the leave requirement was to protect the public administration against false, frivolous or tardy challenges to official action. This policy has something in common with the policy of requiring leave to appeal, namely to act as a filter against frivolous or unmeritorious proceedings.

In our view, based on the above statement of principles and in the context of s 96(a) of the Act, it is laudable, as a matter of policy, to restrict the right of appeal from the Court of Appeal to the Federal Court with leave only to cases where the judgment or order of the Court of Appeal is in respect of any civil cause or matter decided by the High Court on the merits. If a decision of the Court of Appeal made on a motion in a pending appeal is appealable, then the result would be that there would be two appeals in every case 'in which, following the ordinary course of things, there would only be one'. Hence, the policy of requiring leave to appeal under s 96(a) to act as a 'filter' against unnecessary appeals would be defeated.

In support of the above view, we rely on the reasonings of Lord Esher MR in *Ex parte Stevenson* who with great clarity analysed *Lane v Esdaile.* At p 611, the learned Master of the Rolls stated:

> I am, on principle and on consideration of the authorities that have been cited, prepared to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. So, if the decision in this case is to be taken to be that of the judge at chambers, he is the legal authority to decide the matter, and his decision is final; *if it is to be taken to be that of the High Court, then they are the legal authority entrusted with the responsibility of deciding whether there shall be leave to appeal,* and *their decision is final.* In either case there is no appeal to this court. What was said in the case of *Lane v Esdaile* supports the view that I am taking. But the very nature of the thing really concludes the question; for, if, where a legal authority has power to decide whether leave to appeal shall be given or refused, there can be an appeal from that decision, the result is an absurdity, and the provision is made of no effect. If the contention for the claimant is correct, it would follow that the case might be taken from one court to another till it reached the House of Lords on the question whether there should be leave to appeal. (Emphasis added.)

Before concluding we would like to make one observation in respect of the application before us. It is this.

The step taken by the applicant in this application is misconceived. We say so because though the Court of Appeal struck out the notice of appeal, the applicant's rights are not exhausted or shut out or for that matter in any way prejudiced. During the course of the hearing, it was brought to the attention of Dr Das of the provision of r 16 of the Rules of the Court of Appeal 1994. Rule 16 reads:

> Where leave of the Court of Appeal is required, the application for such leave may be made to the court before expiration of the time limited for bringing the appeal or *within such enlarged time as the court may allow.*

A The applicant chose not to resort to r 16 but instead filed the present application purportedly under s 96(a) of the Act.

In reply, Dr Das submitted that the Court of Appeal, in its written judgment in response to the oral application of counsel for the applicant that he be allowed to file a motion for leave remarked, '*We thought it was too late in the day for the request to be entertained*'. Dr Das therefore contended B that it was pointless for the applicant to urge the Court of Appeal to invoke its powers under r 16. However, a look at the order of the Court of Appeal would show that there was no express order refusing the request to file a motion under r 16. In the event, the remarks of the Court of Appeal should be treated as obiter.

C In our view, it was still open to the applicant to file a motion setting out the grounds in support thereof under r 16. Whether the applicant will succeed or not is a different issue altogether. However, Dr Das further contended that if the applicant were to proceed under r 16 and its application is refused by the Court of Appeal, the applicant would be caught by *Auto Dunia*. With due respect, by filing the present application, the D applicant in effect was attempting to circumvent r 16 by coming straight for leave to the Federal Court. In our view, this is an abuse of the process of the court. The applicant must and should first exhaust all remedies available under the law.

E *Conclusion*

In our judgment, for reasons stated and as a matter of policy, the ratio in *Lane v Esdaile*, followed in *Auto Dunia* applies to cover a decision or order of the Court of Appeal like the instant application.

Last but by no means least, I have shown this grounds of judgment in F draft to my learned brother Haidar JCA, who agreed with it.

Accordingly, the preliminary objection was upheld and the applicant's application for leave under s 96(a) of the Act was dismissed with costs. Deposit to the respondent to account of its taxed costs.

Applicant's application for leave dismissed.

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Reported by Jafisah Jaafar

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